60th — 588

IN THE

Supreme Court of the United States,

No. 24.

THE MUTUAL LIFE INSURANCE COMPANY,

PLAINTIFF IN ERROR,

vs.

J. MORRISON HARRIS, SUBSTITUTED AS ASSIGNEE IN PLACE OF HORATIO L. WHITRIDGE, DECEASED, ASSIGNEE OF WILLIAM H. BRUNE.

In Error to the Circuit Court of the United States, for the District of Maryland.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

No. 24. OCTOBER TERM, 1877.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

vs.

J. MORRISON HARRIS, SUBSTITUTED AS ASSIGNEE IN PLACE OF HORATIO L. WHITRIDGE, DECEASED, ASSIGNEE OF WILLIAM H. BRUNE.

The plaintiff in error having made and filed, by leave of Court here, a motion to enter this judgment satisfied, or in the alternative to remand the case to the Circuit Court for the District of Maryland, with a direction to enter it satisfied, now asks leave to file this additional motion in relation to the same matters as are mentioned in the foregoing motion, viz:

The plaintiff asks leave to refer to an exemplified copy of the Record and proceedings in the Supreme Court of the State of New York, and of the Court of Appeals of that State, in a certain action, pending therein, mentioned and referred to in the pleadings and proceedings in this action, wherein Rosalie C. Barry is Plaintiff, and The Mutual Life Insurance Company of New York, and William H. Brune and J. Morrison Harris are defendants,—which exemplified copy of record and proceedings now remains in this Court, having been by leave of the Court here, and the consent of the defendants in error here, filed in the preceding case, between the same parties who are parties to this case,—being No. 23 on the docket of this term.

And thereupon the plaintiff in error here now moves the Court for the relief prayed in its former motion.

And if the Court should be of opinion that the jurisdiction and practice of this Court is such that neither of the modes

indicated in the foregoing motion is proper:—then the plaintiff moves the Court to remand the record to the Circuit Court for the District of Maryland, together with a copy of the foregoing motion and of this motion, and together with the original papers accompanying them, including the said last named record of the Court of Appeals, with direction to said Circuit Court to hear and determine the matter of said motion,—with leave to either party to bring the case again before this Court upon writ of error, after the determination of the matter of said motion,—or in the alternative, the Plaintiff moves the Court here *to refuse a mandate* to said Circuit Court, because unnecessary.

EDWARD OTIS HINKLEY,
For Plaintiff in Error.

To F. W. BRUNE and J. MORRISON HARRIS, Esqrs.
Attorneys for Defendant in Error.

Please take notice, that on the calling of above case, on 22d January, 1878, or as soon thereafter as it is reached, the Plaintiff in Error will submit to the Court the foregoing motion.

17*th January*, 1878.

EDWARD OTIS HINKLEY,
For Plaintiff.

Service of copy admitted.
17*th January*, 1878.

IN THE

Supreme Court of the United States,

No. 24, October Term, 1877.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

vs.

J. MORRISON HARRIS, Assignee or Trustee of WILLIAM H. BRUNE.

In Error to the Circuit Court of the United States for the District of Maryland.

ADDITIONAL BRIEF.

STATEMENT OF THE CASE.

On the 9th day of September, 1872 (Record, fol. 1, p. 1; fol. 84, p. 35; fol. 318, p. 155; fol. 369, p. 176; fol. 374, p. 178), this suit was commenced.

The declarations are set out at fol. 2, p. 1; fol. 85, p. 35.

Both declarations are upon policies issued by the defendant Company to William H. Brune, upon the life of John S. Barry, and dated January 18, 1872—one for $20,000, and the other for $5,000.

These policies were issued upon applications, signed by John S. Barry and William H. Brune, and found at p. 106, folios 193, 195, Exhibits C and D, and upon original applications, Exhibits X and Y, pages 76 and 90, and said policies are Exhibits E, F, pages 107 and 110.

On the 13th of April, 1872, Rosalie C. Barry, the wife of John S. Barry, commenced a suit in equity in the Supreme Court of the State of New York against William H. Brune, Horatio L. Whitridge (to whom Brune had assigned the two policies issued to him on January 18th, 1872,) and The Mutual Life Insurance Company.

Mrs. Barry, in her complaint, sets out the issuance of two policies—upon the life of John S. Barry, her husband, in her favor, one dated January 11th, 1867, for $20,000, and the other dated December 9th, 1870, for $5,000; that the premiums thereon were regularly paid up to December 9th, 1871, and January 11th, 1872, and that Brune and her husband confederated and agreed that the premiums thereon due on those days should not be paid, and that thereby said policies should lapse, and that they would apply to the company for new policies in the place of the old ones. Mrs. Barry also sets out an assignment by her, at the instigation of and under duress from her husband, in July, 1871, of the two old policies, to Brune then a creditor of her husband (Record, p. 8, fol. 19;) that John S. Barry died on March 9th, 1872; that she had furnished the usual proofs of death to the company, and had called upon the company to pay the amount of insurance upon the life of John S. Barry, but that the company refused to recognize her claims and demands on the ground "that her said policies had been surrendered by the said William H. Brune, and that either the said defendant William H. Brune or his assignee, the defendant Whitridge, had claimed the amount thereof" (Record, p. 10, fol. 23;) that the company admits its liability "to pay the amount of such insurance either to the plaintiff or to one or both of the defendants Brune or Whitridge," and refuses to pay plaintiff solely on the grounds aforesaid, (Record, p. 10, fol. 24;) That Whitridge claimed some right or interest in said insurance, by virtue of some assignment

from said Brune. (Such assignment was made 13th February, 1872; See Brune's answer, p. 15, fol. 35.)

The plaintiff Barry demanded judgment.

1st. That the Company may be enjoined from making payment of such insurance to the said defendants Brune and Whitridge, or either of them, (they were so enjoined and continued so to be. See injunction orders, Exhibit Q, p. 220, and Exhibit P, p. 219.)

2d. That the plaintiff might be adjudged not to have parted with or been divested of her right and interests under her said policies or either of them.

3d. That the defendants Brune and Whitridge might be adjudged not to have acquired any right or interest therein.

4th. That the plaintiff might have judgment for whatever is found due and payable on the said policies.

To this complaint the defendant Company interposed no answer, but admitted its liability to pay the amount of said insurance as specified in said policies, issued January 18th, 1872, to whichever party should be adjudged ultimately entitled thereto, and in aid thereof entered into the stipulation of June 20th, 1872, and consented to the order of that date, and paid the amount of insurance into the Supreme Court of the State of New York, to abide the judgment of that Court, as to which of the contesting parties was entitled thereto. Record p. 53, fol. 130; p. 54, fol. 132, p. 63, fol. 153.)

The defendants Brune and Whitridge appeared in the case in Supreme Court of New York, May 11th, 1872, (Record, p. 133, fol. 261,) and on the same day "the summons, complaint, affidavit for injunction, injunction order, and order continuing injunction were forthwith served" on the attorneys of said Brune and Whitridge, (Record p. 133, fol. 262.)

At this time no suit had been commenced in Baltimore, and none contemplated until 60 days, after notice of proof of death to the Company; (this was given on March 26th, 1872,

(N. Y. Record, 17th finding of fact, p. 53, fol. 157,—Record, p. 133, fol. 261.)

The answers of the defendants, Brune and Whitridge, were sworn to in Baltimore on the 27th day of June, 1872. (Record, pp. 15, 16, fol. 37; p. 19, fol. 45,) and served on the 1st day of July, 1872. (Record, p. 134, fol. 263.)

Brune avers in his answer that in January, 1872, when the old policies were first delivered to him, the policy for $5,000 had already lapsed and expired, by reason of the non-payment of the premium due December 9th, 1871, (p. 13, fol. 32) and that the policy for $20,000 did thereafter lapse for the same cause (page 14, fol. 32); and that he was assured by the agent of the Company that the same would lapse, "and that he might, as assignee of said policies, renew and continue the insurance on the life of said Barry, in his own name and for his own benefit" (p. 14, fol. 32); that thereupon he, Brune, delivered to the Company the said two old policies, which had then lapsed, with the assignment thereof from Mrs. Barry (p. 218, fol. 407), "in order to have them properly and legally *renewed for the benefit of this defendant*, to be thereafter held as such security as aforesaid" (p. 14, fol. 33); that thereupon the said two old policies were surrendered to the Company and cancelled, and the two new policies for the same amount and at the same rate of premium were issued to Brune in his name (p. 14, fol. 33.) And Brune avers that the two policies issued January 18th, 1872, "constitute the only claim on the said Mutual Life Insurance Company on account of insurance on the life of said Barry." (Record, p. 14, fol. 34.)

This averment accords with the complaint of Mrs. Barry, as she avers that by the terms of the old policies, "that in case the plaintiff did not pay the said annual premiums on the day mentioned for the payment thereof, that in every such case, such policies should cease and determine" (p. 3, fol. 17); and she avers that the premiums due on the 9th of December, 1871, and January 11th, 1872, were not paid.

Brune, in his answer, claims as affirmative relief "that the defendant Whitridge do collect and receive the amount due under the said policies for the uses and purposes mentioned in said assignment" (p. 15, fol. 37.)

Whitridge, in his answer, (which by an order of the Supreme Court of New York, made on the 4th day of January, 1875, in the action there pending, was ordered to stand and be deemed the answer of the said J. Morrison Harris, his successor in interest—and Harris appeared in that action January 11th, 1875. See New York Record, pp. 35, 36, 37, 38)—avers that the old policies became void upon the failure to pay the annual premiums thereon, on or before the day or days mentioned for such payments; that the premiums which became due on the 9th of December, 1871, and 11th of January, 1872, were not paid, and that said policies became and were null and void (p. 17, fol. 42.)

And as affirmative relief the said Whitridge claimed "that he be adjudged and declared entitled to have and receive the aforesaid insurance money, and every part thereof (p. 19, fol. 45.)

Defendant Harris, in his affidavit made in the New York case on October 3d, 1872, for the purpose of procuring a vacation of the stipulation and order of June 20th, 1872, says that, that action was commenced on the behalf of the widow of said Barry, and "as an equitable action to adjust the adverse claims of said plaintiff, and of said Brune and Whitridge, to the sums insured by said company upon the life of said John S. Barry." (Record, p. 21, fol. 51.)

The counsel for Mrs. Barry, Judge Sanford, in a letter to Mr. Harris under date "New York, April 15th, 1872," says: "For the purpose of testing the questions involved in the conflicting claims of Mrs. Barry and Mr. Brune's assignee, under the policies issued by The Mutual Life Insurance Company of New York, we have instituted suit in her behalf in our Supreme Court, impleading Messrs. Brune and Whitridge, with the company, as parties defendant, *an order has been made enjoining the company from paying over the insurance money to either of their co-defendants until the further order of the Court, and cause must be shown on the fourth Monday of April why such injunction should not be continued during the litigation.*" (Record, p. 24, fol. 57. See injunctions, pp. 220, 219. Served May 11th, 1872, on the attorneys of Brune and Whitridge, page 26, fol. 62.)

Defendant Harris, in his letter of May 14th, 1872, to Mrs. Barry's counsel, proposed "that they divide the gross "amount of these insurances, and close up the matter." (See letter, p. 25, fol. 61.)

And Mrs. Barry's counsel, in his affidavit of October 16th, 1872, says, "that this (the New York) action was brought for "the purpose of determining the conflicting claims of the "plaintiff, and of the defendants Brune and Whitridge, to "the moneys due and payable, *and acknowledged by the "Mutual Life Insurance Company to be due and payable, "under the life policies issued by said Company to the de-"fendant Brune*; that deponent has always regarded the "case as equivalent to a bill of interpleader, and has never "been able to discover why the respective rights of the "plaintiff and of the defendants Brune and Whitridge *to the "fund in controversy*, cannot be fully and finally determined "in this suit; that this Court acquired complete jurisdiction "of this whole controversy, of its subject-matter and of all "the parties thereto, by the commencement of this action, by "the injunction order made therein, by the voluntary appear-"ance of all the defendants and the service on their respect-"ive attorneys of the summons and complaint herein, *and "also of said Injunction Order*, before any suit whatever "was instituted by any one else in any jurisdiction, at all re-"lating to the transactions involved; that, as deponent "verily believes, any other suit relating thereto is wholly "unnecessary, if not vexatious; that the plaintiff has become "entitled to the security afforded by the deposit in the Trust "Company *of the fund in controversy*, and that the with-"drawal thereof would impair the interest both of the plain-"tiff and of the defendants Brune and Whitridge." (Record, p. 27, fols. 64, 65.)

And Mrs. Barry's counsel, in opening the New York case for trial in October, 1875, said, "*the only claim* Mrs. Barry "has ever made against the Company is to the moneys due "and payable and acknowledged by the Mutual Life Insur-"ance Company to be due and payable under the life policies "issued by said Company to the defendant Brune."

If a reference to the Exemplified Record in the New York case be proper—and we respectfully contend that it is—it

will be seen by the 14th finding of fact, it is established that "application to the Company was to be made by Brune and "John S. Barry to permit the said defendant Brune, *as as-* "*signee of the said* policies, *to renew and continue* the said "insurance on the life of the said Barry, in his own name, "after having first surrendered to the said Company the "plaintiffs' said policies." (N. Y. Record, p. 139, fols. 140, 141.)

And by the 16th finding of fact, it is found that "the said "new policies were thereupon [on the surrender and can- "cellation of the old policies issued in the name of Mrs. "Barry and assigned to Brune] delivered to and accepted "by the said defendant William H. Brune, *in the place and* "*stead of and as substitutes for* the policies which had "been surrendered and cancelled as aforesaid." (N. Y. Record, p. 51, fol. 152.)

Nineteenth finding of fact shows, that the New York action was commenced on the 13th April, 1872, and on the same day an order was issued restraining The Mutual Life Insurance Company from making payment of the moneys, or any part thereof, claimed by Mrs. Barry in her complaint, to the defendants Brune and Whitridge, or either of them; and on April 22d, 1872, said injunction was made absolute. (New York Record, p. 157, fols. 158, 159.)

That Brune and Whitridge appeared in said action and put in their answers July 1st, 1872.

That on September 9th, 1872, Whitridge commenced an action upon the two policies issued to Brune January 18th, 1872; and on December 2d, 1873, recovered judgment therein for $27,175, besides costs. That Whitridge had died, and J. Morrison Harris had been duly substituted as his successor, and succeeded to all the right or interest of Whitridge in the subject-matter of that action. That on January 4, 1875, by order of the Supreme Court of New York, that action had been continued against Harris, as the successor in interest of Whitridge; and it was further ordered that the answer of Whitridge stand as the answer of said Harris, and that he had duly appeared therein by his attorneys named. (N. Y. Record, pp. 53, 54, 55).

Twentieth finding of fact states that The Mutual Life Insurance Company had "*at all stages of this action conceded* "*its liability to pay the amounts due upon the two policies of* "*insurance dated January* 18th, 1872" and which were "*the subject of this action*;" and had at all times offered to bring the said monies agreed to be paid thereby, into the Court to abide its order, upon being discharged from all claim by the adverse parties thereto, and from all liability to them. That said company had not in any way colluded with either of the parties in that action, touching the matter in controversy therein. (N. Y. Record, p. 55, fols. 163, 164).

The Conclusions of Law are stated on pages 55, 56, 57, and Ninth Conclusion on p. 59, of New York Record.

The judgment of the Court at Special Term is found at pages 60, 61, 62, 63, 64, 65, 66, of N. Y. Record.

The orders of the Supreme Court, on pages 155 and 164, of N. Y. Record, show the payment by the Mutual Life Insurance Company into that Court on the 11th of October, 1875, of the sum of $30,899.71, in full compliance with the judgment for that amount of October 8th, 1875, and in full satisfaction of the judgment of December 2d, 1873, in the Circuit Court of Maryland, and in full of all claims of any or either of the parties to that action against said Company, by reason of any insurance on the life of said John S. Barry.

At page 157, same Record, is the opinion of Judge Van Vorst, at Special Term; at page , same Record, is found the judgment of affirmance at the General Term; and at pages , is the opinion of the General Term, and the same is also reported in 15 N. Y., S. C. Rep., 395, (8 Hun.)

At page , is the notice of appeal from the judgment of the General Term to the Court of Appeals.

At pp. , are the judgments of affirmance, of that judgment by the Court of Appeals, and the judg-

ment thereon of the Supreme Court on filing the remittitur from the Court of Appeals.

Recapitulation of Facts undeniably Established.

1. That the action in the Supreme Court of New York was commenced by Mrs. Barry against Brune and Whitridge and the Company, on April 13, 1872.

2. That said defendants Brune and Whitridge voluntarily appeared in said action May 11, 1872, and filed and perfected their answers therein on July 1, 1872.

3. That the subject-matter of that action was to determine which of the parties therein, viz., Mrs. Barry Brune or Whitridge were entitled to receive the amounts of the two policies on the life of John S. Barry, dated January 18, 1872, and which the Company acknowledged its liability to pay to whichever of the claimants was legally entitled thereto.

4. That all the Courts in New York have decided that the subject-matter of the controversy in the action pending in the Courts of that State was, as stated in the last proposition, viz., whether Mrs. Barry, the plaintiff, was entitled to have and receive the amounts of said Policies of January 18, 1872, or whether the defendants, Brune, Whitridge or Harris, was entitled to the same, or any part thereof.

5. That the judgment recovered in Baltimore for the amount of said Policies was held by said Brune and Harris for the benefit of the plaintiff, Mrs. Barry, and she was equitably entitled to the moneys to be received and collected thereon.

6. That the payment by the said Insurance Company into said Supreme Court to the credit of that action, would be a payment by it of the amounts due on said policies of January 18th, 1872, and of said Maryland judgment, and a discharge of said Company of and from all claim by any and all the parties to said action, against said Company, by reason of or on account of said two policies of Insurance, and said Maryland judgment, and should be and operate as a payment and satisfaction of the same.

7. That the suit commenced in said Circuit Court in Maryland, was begun on the 9th of September, 1872, to recover the amount of said two policies of January 18th, 1872, and after said action in New York had been commenced and was at issue. That said action in said Circuit Court was prosecuted for the same cause of action as that in the pending New York suit, and to enforce the same claim as the said Brune and Whitridge had made by their answers in the New York suit, and was in contest therein. (See opinion of Court of Appeals subjoined.)

And it follows that the Supreme Court of New York, having first acquired jurisdiction of the parties and the subject-matter of controversy between them, was competent to and it was its duty to pronounce final judgment therein, and such judgment is final, binding and conclusive upon all the parties thereto.

The parties to the controversy (viz. which was entitled to the proceeds of the two policies of January 18, 1872,) have all had their day in Court, and their respective rights and claims have been adjudicated, and the judgment therein cannot now be questioned or impeached.

From these facts it is confidently submitted that the following propositions of law are appropriate and controlling, and should lead to a reversal of the judgment of the Circuit Court.

First Point of Law.

The judgment of Judge Barrett, so far as it effected The Mutual Life Insurance Company, was final. The Supreme Court of New York having first acquired jurisdiction of the subject matter of controversy, and of the parties thereto, was competent to pronounce judgment therein, and which judgment was binding and conclusive not only upon the parties thereto, but upon every other Court.

The case of Burnley *v.* Stevenson, 24 Ohio Rep. 474, is in point.

The Court says:—"The Constitution of the United States declares that full faith and credit shall be given in each State to the records and judicial proceedings of every other State, and provides that Congress may prescribe the mode of proving such records and proceedings, and the effect thereof. By an Act of May 26, 1790, Congress declared that records and judicial proceedings of the State Courts, 'when properly authenticated, shall have the same faith and credit given to them in every Court within the United States, as they have by law or usage, in the Courts of the State from whence they are or shall be taken;' when, therefore, a decree rendered by a Court in a sister State having jurisdiction of the parties and of the subject matter, is offered as evidence, or pleaded as a foundation of a right, in any action in the Courts of this State, it is entitled to the same force and effect which it had in the State where it was pronounced. (Mills *v.* Duryea, 7 Cranch, 481. Hampton *v.* McConnell, 3 Wheat, 234. McGilray & Co. *v.* Avery, 30 Vermont, 538.) That this decree had the effect in Kentucky of determining the equities of the land in this State, we have already shown; hence the Courts of this State must accord to it the same effect. The Constitution of the United States declares that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' (Section 1, Article IV.)

And this mandate is as obligatory upon the Courts of the United States as upon those of the several States."

In the case of Smith *v.* McIver, 9 Wheaton, 532, the Supreme Court held that, "in all cases of concurrent jurisdiction, the Court which *first* has possession of the subject must determine it conclusively."

Same point is ruled in Stearns *v.* Stearns, 16 Mass., 171, and in Winn *v.* Albert, 2 Md. Chancery Decisions, 42.

In the Massachusetts case the rule is thus stated: "Where different Courts have concurrent jurisdiction, the one *before whom proceedings may be first had, and whose jurisdiction first attaches*, must necessarily have authority paramount to the other Courts, or rather, the action first commenced is not affected by or abated by an action commenced between the same parties, in relation to the same subject, in the same or any other Court."

We maintain that the Supreme Court of New York, having first obtained jurisdiction of the parties and of the subject-matter of the action rightfully, it was its duty to proceed to final judgment, disposing of all the rights of the parties in this action to the subject-matter in controversy therein, and which final judgment is to be and will be respected here and everywhere.

We also refer to *ex parte* Robinson, Marshal of U. S. C. McLean's Reports, 355.

The principle enunciated in that case was this:—that where a concurrent jurisdiction may be exercised by the Federal and State authorities, the Court which *first* takes jurisdiction can be interfered with by no other Court, State or Federal. It is a subversion of judicial power to take a case from a Court having jurisdiction, before its final decision is given.

In Peck *vs.* Jenness, 7 Howard 612; Grier, J., in his opinion, says:—"It is a doctrine of law too long established to require a citation of authorities, that when a Court has juris-

diction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed, is regarded as binding in every other Court; and that when the jurisdiction of a Court and the right of a plaintiff to prosecute his suit in it, *have once attached*, that right cannot be arrested in another Court. These rules have their foundation, not merely in comity but in necessity."

To same effect is Wallace *v.* McConnell, 13 Peters, 136.

And the point we make here is that the Supreme Court of New York having first obtained jurisdiction of the parties to this controversy and the subject matter of it, rightfully exercised that jurisdiction to a final determination of all the rights involved, and its judgment will be respected, and can be enforced everywhere.

The case of Galpin *vs.* Page, 18 Wallace, p. 350, is in point.

The head-note is:—"When the Courts of a State, in a trial brought to settle an alleged co partnership between the plaintiff and a deceased partner, and the Supreme Court of the State decided that there had been no sufficient service on an infant defendant who had succeeded to an undivided interest in the property of the deceased partner, and consequently that the lower Court had authority to appoint a guardian *ad litem* for such infant, and thereupon reversed a decree directing a sale of the property of the deceased; such adjudication is the law of the case, and is binding upon the Circuit Court of the United States in an action brought by a grantee of the heirs-at-law of the deceased against a purchaser at a sale under such decree."

But whatever doubts may have existed or could be suggested as to this doctrine and its application, they must be regarded as finally settled in the case of Habich *v.* Folger, 20 Wallace, 1.

There the Court says, in reference to the obligatory character of a judgment- "This judgment is binding upon the cor-

poration and the receivers, and in the case of a suit brought by either of them against the trustees, would be an indisputable bar to their right of recovery, and this in any State of the Union. The appearance by authorized attorneys was equivalent to a personal service of process upon those parties."

And in Dobson *vs.* Pearce, 2 Kernan, 156, Allen, J., says: —"In the State of Connecticut it is quite clear the question *of fraud* would not be an open question between the parties, but would be considered entirely settled by the decree of the Court of that State. And as full faith and credit are to be given by each State to the judicial proceedings of every other State, *that is, the same credit*, validity and effect as they would have in the State in which they were had, the parties are concluded in the Courts of this State by the judgment of the Court in Connecticut directly upon the question in issue."

See also Mills *vs.* Duryea, 7 Cranch, 481, ; Hampton *vs.* McConnell, 3 Wheaton, 234 ; McGeilvray & Co. *vs.* Avery, 30 Vermont, 538.

The Court, at Special Term, having found that the policies issued to Brune on the 18th day of January, 1872, were, as between him and Mrs. Barry, a renewal and continuation of those which respectively lapsed on December 9, 1871, and January 11th, 1872, and that the said two policies of January 18th, 1872, were for the use and benefit of the plaintiff, with the same effect as if the said original policies had never lapsed, been forfeited, cancelled or surrendered, (fol. 187,) adjudged that the defendants Brune, Whitridge and Harris, respectively received and hold the policies of insurance last mentioned, bearing date January 18, 1872, and said Harris now holds the said policies of insurance and the said judgment recovered thereon by said Whitridge in the Circuit Court of the United States for the District of Maryland, "*charged with a trust in favor of said plaintiff, to hold the same for her benefit and to account therefor to her.*" (Fols. 188, 189.)

And such adjudication is conclusive upon all the parties to this action.

In Shelby *vs.* Bacon, 10 Howard 56, the Court held:—"There is no principle better settled than that where two or more tribunals have a concurrent jurisdiction over the same subject matter and the parties; a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other."

In Harris *vs.* Carpenter, 91 U. S. 266, the Court said:—"The State Courts have full and ample jurisdiction of the cases, and no sufficient reason appears for interference with their proceedings."

In Eyster *vs.* Graff, 91 U. S. 524, it is said:—"The Court, in the case before us, had acquired jurisdiction of the parties and of the subject matter of the suit," and held a decree of foreclosure good, though the mortgagor, after commencement of foreclosure suit and before decree, had become bankrupt.

In Gould *vs.* Evansville R. R. Co., 91 U. S. Rep. p. 527, it was claimed and held that the Court there had jurisdiction of the parties and of the subject matter of the action; and at pp. 533—534, it is said:—"Except in special cases the plea of *res adjudicata* applies not only to points upon which the Court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation and which the parties exercising reasonable dilligence might have brought forward at the time."

In Louer, *et al. vs.* U. S., 91 U. S. Rep. 539, which was for a mandamus, the same reference is made to the conclusiveness of an adjudication, and it is said:—"It was rendered by a Court having jurisdiction of the parties and of the subject matter."

Gilman *vs.* Illinois and Mississippi Telegraph Co. 91 U. S. Rep. 616, was where a bill for foreclosure of two mortgages was filed in a State Court, and the Court said:—"That the

Court therefore had full jurisdiction as to the rights of all the parties touching both the instruments."

Lamp Chimney Co. *vs.* Brass and Copper Co., 91 U. S. Rep. 666:—The question here was upon the jurisdiction of a District Court to decree a corporation bankrupt, and the Court said the case was controlled by the general rule that "where it appears that the Court had jurisdiction of the "subject matter and that process was duly served *or an* "*appearance duly entered*, the judgment or decree is "conclusive and is not open to an enquiry upon the "merits."

Ober *vs.* Gallagher (supra) p. 294—the Court says:—"If all the defendants were served with process in the District or voluntarily appeared in the suit, the decree when passed would bind all"

In Brown *vs.* Nichols, 42 N. Y. 26, it was held that the appearance itself gave the Court jurisdiction over the person of the defendants and it was too late after that to assert that the appearance was irregularly secured.

State of Florida *vs.* Anderson, 91 U. S. Rep. 684. In that case the State Court acquired jurisdiction of a litigation about a Railroad, and the Courts of the United States respected that jurisdiction and assisted it by an injunction, saying—"it was in part ancillary to the relief sought there."

French *vs.* Hay, 22 Wallace, 253, is a strong case to show the authority of a Court which first gets jurisdiction, to hold it and enjoin parties from prosecuting elsewhere. There French obtained a decree in a State Court against Hay, and then, after removal of the case to the U. S. Court, and pending proceedings to vacate it, took the record of the decree to another State and sued upon it. Afterwards the decree was vacated and then the U. S. Court enjoined French from proceeding in the State Court. The language of the Court is very plain and emphatic:—"The Court having jurisdiction, *in*

personam, had power to require the defendant to do or refrain from doing anything beyond the limit of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory."

See also French *vs.* Shoenaker, 12 Wallace, 86, in which it appears that after a decree rendered by the Chief Justice in the Circuit Court in Virginia, French attempted another proceeding in the District of Columbia, but the Circuit Court enjoined him, and on appeal to the Supreme Court of the United States it was held that order was just.

High on Injunctions, Sections 44, 47, 57, 58, 59 and 60, are in full accord with the decision in French *vs.* Hay, Section 47—"The propriety of confining litigation to the forum in which it first commenced has repeatedly been recognized by Courts of Equity, and an injunction will generally be allowed to prevent either party from removing the litigation into another Court." Sec. 60: "While, therefore, the Court will assume no control over the course of the proceedings in the foreign tribunal, it may and will interfere to prevent those who are amenable to its own process from instituting suits in other States which will result in injury and fraud."

And see cases there cited, particularly

Dehon *v.* Foster, 4 Allen, 545,
Vail *v.* Knapp, 49 Barb. 299,
Great Fall *v.* Wooster, 23 N. H., 470,

from which extracts are made under Sec. 60 of that work.

In Taylor *vs.* Carryl, 20 How. 595, all the Judges concurred, "That when a Court has jurisdiction it has a right to "decide every question which occurs in the cause, and when "the jurisdiction of the Court and the right of the plaintiff "to prosecute his suit have once attached, that right cannot "be arrested or taken away by another suit."

And in this case, Chief Justice Taney, in his dissenting opinion, said, at p. 607:—"That between Courts of concur-"rent jurisdiction, the Court that first obtains *possession of*

"*the* controversy or of the property in dispute must be al-
"lowed to dispose of it *finally* without interruption from the
"co-ordinate Court."

In Ober *v.* Gallagher, 93 U. S. (3 Otto) 206:—"Having ob-
"tained rightful jurisdiction of the parties and the subject
"matter of the action for one purpose, the Court will make
"its jurisdiction effectual for complete relief."

"Having jurisdiction for one purpose, it may be retained
"for all within the general scope of the equities to be en-
"forced."

SECOND POINT.

"Full faith and credit shall be given in each State to the
"public acts, records and judicial proceedings of every
"other State." (Constitution of the U. S. Article 14, § 1.)

(*a.*) The judgment of a Court of one of the United States must receive, in the Courts of every other State, the same faith and credit which is awarded it in the State wherein it was rendered. (Warren Manuf. Co. *vs.* Ætna Ins. Co. 2 Paine, 501; Whitaker *vs.* Brownson, Ib. 209; Westervelt *vs.* Lewis, 2 McLean, 511; Lincoln *vs.* Tower, Ib. 473.) And a decree of a Court of Equity in one State may be enforced in another State. (Shields *vs.* Thomas, 18 Howard, 253; Amory *vs.* Amory, 2 Am. Law Reg. 38; 3 Biss. 266; 18 Int. Rev. Record, 149; Galpin *vs.* Page, 18 Wall. 350; 1 Sawyer, 309.) The judgment rendered is conclusive. (See also authorities before cited.)

Green *vs.* Van Buskirk, 7 Wall. 139.
Beloit *vs.* Morgan, 7 Wall. 619.
Sturdy *vs.* Jacaway, 4 Wall. 174.
Mayhew *vs.* Thatcher, 6 Wheaton, 129.

And the rule that a fact which has been tried and decided by a Court of competent jurisdiction cannot be contested again between the same parties in the same or any other Court, applies equally to a verdict and judgment in a Court of common law and to a decree in a Court of Equity. They both stand on the same footing, and may be offered in evidence under the same limitations.

It is not confined to judgments of the same Court or to the decisions of Courts of concurrent jurisdiction, but extends to every Court which has proper cognizance of the subject matter, so far as they profess to decide the particular matter in dispute. (Hopkins *vs.* Lee, 6 Wheaton, 109.)

When a Court of Equity has jurisdiction, its decrees are as binding, to every intent, as the judgments of a Court of law. (Nations *vs.* Johnson, 24 How. 195.) The judgment is therefore conclusive, whether the suit in which it is rendered be in equity or at law.

The judgment, so long as it remains in force, is evidence of the title adjudged by it. Errors committed by the Court, however apparent, can be examined only by an appellate power. (Tioga R. R. Co. *vs.* Blossburgh, 20 Wall. 137.)

THIRD POINT.

The exclusion of the Record containing the Judgment of Interpleader was erroneous, and can be maintained only on the three following grounds, viz:

1. That the same was inadmissible under the plea and agreement contained in the Record.

2. That the New York Court had not first acquired jurisdicion of the parties and of the subject matter of the controversy.

3. That the plaintiff in the New York suit, did not claim to be entitled to the same policies for which suit was brought in Maryland, and that they were not the subject matter of controversy in both actions.

Now it is insisted that the converse of the second and third propositions is true beyond all controversy, as the preceding facts demonstrate, and so held and decided by the Courts of New York, and such decisions are final and conclusive.

The authorities above cited show that Judge Barrett's judgment or decree of the 26th November, 1873, was entitled to full faith and credit in the Circuit Court of Maryland as in all other Courts, and being rendered in an action *first commenced*, was final and conclusive upon the parties to that action, not only in the Supreme Court of New York, but in all other Courts. (Judgment, p. 222, fol. 415.)

This judgment disposed of all the matters in controversy between Mrs. Barry and Brune and Whitridge, affecting the Mutual Life Insurance Company, and directed the deposit of the amount adjudged to be due from The Mutual Life Insurance Company on account of all insurance on the life of John S. Barry, and that upon such deposit said Company "be released, acquitted and discharged from all claims or "liabilities to the said Rosalie C. Barry, plaintiff, and Wil- "liam H. Brune and Horatio L. Whitridge, defendants here- "in, or any or either of them for, upon, or by reason of the "said sum of twenty-five thousand dollars or upon said "policies of insurance;" and all parties were enjoined from commencing any action against said company on account of such insurance or from proceeding in any action already commenced and particularly that pending in said Circuit Court of Maryland. (Record, p. 222)

As to the first ground for exclusion, we maintain :—

1. It was error to refuse to permit this judgment of interpleader to be filed at the trial on the 29th of November, 1873, under and as part of the agreement of November 18, 1873, (p. 226, fol. 425.)

The Record shows that "after the plaintiff's counsel had "stated his case, and before the evidence was read" on November 25, 1873, the defendant's counsel asked for a postponement of the trial, "and the Court postponed the further "hearing until Saturday, 29 November, 1873." (Record, pp. 220, 221, fol. 412.)

By the agreement therefore made on November 13th, 1873, the two cases had been consolidated, and were to be heard and tried together, (Record, p. 69, fol, 169) and a statement of facts had been agreed upon on November 18th, 1873, (Record, pp. 70, 71.) This statement of facts was filed upon the trial, (p. 69, fol. 168.)

The statement in the 9th Clause of the agreement, on p. 71, incorrectly recites order of Nov. 17, 1873. (See same Ex. M. p. 218.) The order of Nov. 12, 1873, was not therefore vacated, but only as to the injunction on Brune and Whitridge, and that solely on the ground that Judge Danforth's order of May 2, 1873, (Ex. 1, p. 151) was in full force, and therefore a further order was unnecessary.

The 10th Clause of the agreement (p. 71) states that Mrs. Barry's suit in the Supreme Court of New York was then pending, and the parties thereto having in the previous clauses agreed to admit all the proceedings therein to, and including Judge Barrett's order of November 17th, 1873, further agreed that "if there should be any further proceed-"ings *thereon, which either party may think material, they* "*may be filed as part of this agreement*, at any time before the trial of this case." (Record, p. 71.)

The continuance from Nov. 25 to Nov. 29th, 1873, was merely formal, and the offer to read Judge Barrett's judg-

ment of interpleader and discharge, having been made "at the opening of the Court, and before plaintiff's counsel had read any part of the evidence in the case," and to file the same under said agreement, was within the express terms of the agreement, and it was clear error in the Court to exclude the same as it did, at page 226.

It was offered on three grounds:

1. As being embraced by the terms of the agreement—was it not? The agreement declares that if there should be any further proceeding "*thereon*," which either party to the agreement might think material, they might be filed as part of that agreement. The previous clause shows what the parties had in mind in the use of this language. It was the answer and petition of the Company by way of interpleader. (Record p. 71, 180.) The further proceedings "*thereon*," viz: said bill of interpleader and Judge Barrett's order of November 12th and 17th, 1873, if any should take place, if either party deemed the same material might be filed as part of that agreement. It is true they were to be filed at any time before the trial, and we contend that the filing the same before any evidence had been given on either side was "*before the trial*," and was within the meaning and fair intendment of the agreement. It is a strained construction of the language used, to hold that the "further proceedings" must be filed before the trial *commenced*. The fair intent and meaning of the whole agreement is sustained by holding that if at any time before the trial was *concluded*, the further proceeding was filed, it was what the parties contemplated. But in fact the "trial" did not actually commence before the introduction of any evidence. A trial cannot properly be said to be commenced before the introduction of any evidence by either party. It cannot be maintained upon the facts stated in the bill of exceptions, that within the meaning of this agreement the trial began on November 25th, and the saying of the judge, inserted in the bill at p. 221, "that he would "consider the trial as begun on that day, Tuesday 25th "November, 1873," was *obiter* and unauthorized, and neither bound the parties nor the Court.

2. Irrespective of the agreement, we contend that it was available as a plea '*puis darien continuance*,' and offered as such plea at the right time. (Record, p. 226, fol. 427.

In Browne *vs.* Seymour, 9 Johns, 221, it was held that where two actions are brought for the same cause, satisfaction of the judgment in one suit may be pleaded by way of *puis darien continuance* to the other suit, and the Court says:—"For here the defendant would not be obliged to pay the "money twice, since payment at least, if not a recovery, in "the one suit, might be pleaded *puis darien continuance* to "to the other suit; and if the two suits should even proceed, "*pari passu*, to judgment and execution, a satisfaction of "either judgment might be shown, upon *audita querela* or "otherwise, in discharge of the other."

The practice in the Circuit Court of the United States is in all respects similar to that of the Courts of the several States in which they act. The case is opened, etc., a plea of *puis darien continuance* may in like manner be pleaded; a demurrer to evidence may in like manner be pleaded, etc., etc. (Conkling's Treatise, p. 412.)

"Such a plea is a matter of right, and neither the Court in "bank nor the Judge at Circuit has any discretion to reject it." (Sanford *vs.* Sinclair, 3 Denio, 269, per Bronson, Ch. J.)

Broome *vs.* Beardsley, 3 Caines' Rep. 172;—it was held that a matter arising between a Term and a Circuit may be pleaded at the Circuit as a plea *puis darien continuance* at any time before verdict rendered, and the Judge at *Nisi prius* is bound to receive it.

S. C. Coleman and Caines' cases, 493. In this case the Court says—"The case of Powis *v.* Salkeld, 2 Wils. 138, is "decisive that a plea *puis darien continuance* is a matter of "right, and if verified by affidavit the Judge has no discre-"tion to accept it or not, but is bound to admit it."

Reid *v.* Nicholson, 5 Taunton 665; "an executor may plead "*puis darien continuance*, unreversed judgments in debt on "contracts of testator, recovered against the executor in suits "commenced since he pleaded the general issue in bar."

In Spofford *vs.* Woodruff, 2 McLean, 191, after general issue pleaded, and since last continuance, a plea *puis darien*

which alleged that this action is brought against defendant as endorser of a note on which the plaintiffs, who are the holders, since the last continuance of this cause, obtained a judgment against the maker and the first endorser, and that plaintiffs had given time to the defendants in that judgment which operates as a release to the defendant in this action: on a motion to strike out the plea, it was held that it should be denied, and that the Court was bound to receive the plea.

So, in Yeaton *vs.* Lynn, 5 Peters, 223, it was held—that if any matter of defence had arisen after an issue in fact, it might be pleaded by the defendant: as, that plaintiff had given him a release; or in an action by an administrator, that the plaintiff's letters of administration had been revoked.

In covenant against executors, the defendants pleaded at *nisi prius*, as a plea *puis darien continuance*, a judgment recovered upon a bond of the Testator after the last continuance, to wit, on the second day of August as of the preceding Term, and the plaintiff having pleaded over: Held—that the plea was an answer to the action, although by fiction of law, the judgment was obtained before the last continuance, where the purposes of justice require that the true time when a judgment is recovered or a writ tested shall be shown, it is competent to a party to avail himself of the fact by averment in pleading. (Lyttleton *vs.* Cross, 5 Dowl. & Ryl; 175.)

Finally, in Pearson *vs.* Perkins, Hil. T, 3 Geo. 1, Bullers, N. P., p. 310, it was held that a plea *puis darien continuance* may be pleaded after the jury are gone from the bar, but not after they have given their verdict. Cited with approval in Broome *vs.* Beardsley (*supra*).

For these reasons, in excluding Judge Barrett's judgment on interpleader as evidence, under the agreement, or as a plea, the Circuit Judge erred, and the judgment of the Circuit Court should be reversed, and that the judgment of this Court be rendered for

the plaintiff in error or that a *venire de novo* be awarded.

HENRY E. DAVIES,
EDWARD OTIS HINKLEY.
For Plaintiff in Error.

COPY OPINION OF COURT OF APPEALS.

COURT OF APPEALS.

ROSALIE C. BARRY, *Resp't,*
against
WILLIAM H. BRUNE and o'rs, *App'l'ts.*

S. P. NASH, for Appellants;
E. R. ROBINSON, for Respondent;
H. E. DAVIES, for Insurance Co.

EARL, J.,

The questions involved upon this appeal were so thoroughly examined and considered in the Supreme Court, that little more is needed here than briefly to announce the conclusions we have reached.

1st. The case of Barry *vs.* The Equitable Life Assurance Co. 59 N. Y. 587, concerned one of the policies attempted to be assigned by the same instrument which was proved in this case. It was there held that the assignment was wholly invalid, and conveyed no legal or equitable title to or interest in the policies attempted to be assigned. That, like this, was an equitable action to determine the conflicting claims of the plaintiff, and of the defendants Brune and his assignee, to the amount due upon the policy there involved, and it was decided that she was entitled to recover the amount.

Therefore, but for the new policies taken out by Brune, this case would be wholly controlled by the decision in that (2.) Brune, having no title to or interest in the policies, had no right to surrender, cancel or impair them, or to deal with them in any way. But for the purpose of getting title to them, he and plaintiff's husband arranged, without her knowledge, to permit the policies to lapse for non-payment of the premiums, and then to take out new policies to Brune as creditor of the assured.

It matters not that neither Brune nor Mr. Barry was bound to pay the premiums. We may assume that she, a married woman, expected and had the right to expect that one of them would keep the policies in life by payment of the premiums. The policies were of value to her, and she had an interest to keep them in life, and they at least owed her the duty to apprize her of what was going on with the policies, so that she could pay the premiums if they were unwilling to do so.

It is clear that the old policies were the consideration of and the inducement to the new policies. The new policies could not have been obtained but for the possession and surrender by Brune of the old policies, and the premiums upon the new policies were paid in part by a cash dividend due upon one of the old policies. Brune thus, by means of the possession of the old policies, which belonged to the plaintiff, and by using and surrendering them, obtained the new policies. The real substance of the transaction was a substitution of the new policies for the old, for the purpose of getting the security which the old did not give him.

Under the circumstances of this case, both upon reason and authority, the substituted policies in equity simply take the place of the old policies, and the money payable thereon must go to the party entitled under the old policies.

For this conclusion there is abundant reason and authority. (Story's Eq. Jur., Secs. 1254, 1257, 1258, 1259, 1262, 1265; Bunyon on Life Ins., 302; Nesbitt *v.* Berridge, 10 Jurist, N. S. 53; Norwood *v.* Guerdon, 60 Illinois, 253; Chapin *v.* Fellows, 36 Conn., 132; Lemon *v.* The Phœnix Life Ins. Co., 38

Conn., 294; Dutton *v.* Wilner, 52 N. Y., 313; Mitchell *v.* Reed, 61 N. Y., 123.)

3d. The pleadings, proofs and findings show that the Insurance Company was willing to pay the amount due upon the policies to the person entitled thereto; that the plaintiff claimed it was due to her, and that Brune's assignee claimed it was due to him; and hence it was proper to determine in the action the conflicting claims to this money, and the judgment of the Court making such determination, and protecting the Insurance Company against double payment, was right.

The judgment must therefore be affirmed, with costs.

All concur. Folger, J., did not sit.

(A Copy.)

H. E. SICKELS,
Reporter for C.

The following is the assignment of error. (See Record, p. 231.)

"The plaintiff in error in the foregoing record assigns for errors:

"*First.*—That the Court refused to allow the matter of the "decree of interpleader in the New York case, which is men- "tioned at the end of the first bill of exceptions, to be set up "in any manner, either by way of plea or in evidence.

"*Second.*—That the Court, upon the agreed statement of "facts, rendered judgment against the defendant, as stated "in the second bill of exceptions; and it prays for a reversal "of said judgment, and that the judgment of this Court be "rendered for the plaintiff in error."

EDWARD OTIS HINKLEY,
For Plaintiff in Error.

Motion

STATEMENT OF THE CASE.

In the case in the Supreme Court, for City and County of New York, Rosalie C. Barry was Plaintiff, and The Mutual Life Insurance Company of New York, William H. Brune, and Horatio L. Whitridge, and afterwards J. Morrison Harris, in place of Whitridge, deceased were Defendants.

The judgment Roll in that case duly exemplified according to Revised Statutes of United States, shews the following:

FINDING OF FACTS.

1. The Mutual Life Insurance Company of New York, a corporation under Acts of the State of New York, issued a policy No. 56,527, on 11th January, 1867, for $20,000, on the life of John S. Barry, in favor of his wife Rosalie, the complainant.
2. The said Company issued another policy No 116,525, on 9th December, 1870, in like manner for $5000.
3. In each of the policies there was a provision for forfeiture, upon non-payment of the premiums when due.
4. The premiums on these two policies were paid partly in cash, and partly by surrender of profits.
5. On 21st January, 1871, the Defendant William H. Brune, left the firm of John S. Barry & Co. about $15,000.
6. On 15th May, 1871, the Defendant under the firm name of F. W. Brune & Sons, lent John S. Barry & Co. about $50,000 more; who agreed at same time to give policies on the life of said John as security.
7. On 21th July, 1871, there were further loans of about $15,000 by said Brune, to John S. Barry & Co.
8. In the latter part of July, 1871, Mrs. Barry, acting under her husband's influence "unduly exercised and not freely or voluntarily, but in fear of and under compulsion from her husband," signed in blank an assignment of these policies.
9. He said it was as collateral to raise $10,000, and if she did not sign it, he was a ruined man.
10. "*She acted under duress, coercion and undue influence,*" in signing the instrument, and never received any consideration for signing it.

11. On 2nd August, 1871, a member of the firm of John S. Barry & Co. filled up the blank in the printed form of assignment, and witnessed it and sent it to Mr. Brune at Baltimore, in fulfilment of Mr. Barry's promise, conveying the two policies above mentioned.
12. The policies themselves were delivered later viz. in January, 1872.
13. Brune had no notice of the duress or coercion, practiced on Mrs. Barry, or of her husband's statements to her, but acted in good faith.
14. The premiums due in December, 1871, and January, 1872, respectively were not paid on those days; but it had been agreed between Brune and Barry that these payments should not be made, in order to allow the policies to lapse, and let Brune, as assignee of the said policies, renew them in his own name, after surrendering the old policies and paying up the premiums which had not been paid—in which application the Insurance Company subsequently acquiesced.
15. On the 12th January, Brune and Barry signed printed "*declarations to be made, and signed in case of issuing new policy after lapse*," in which the old policies were referred to by their numbers, and the original applications were also referred to by their dates, and adopted as the basis of the contract, and the old policies were sent with these declaration to the Company.
16. The Company then issued two new policies of same amount, with same annual premiums, and payable on same days, and designated by the same numbers, in the name of said Brune, without any new medical examination of Mr. Barry, and without any other consideration than the surrender of the old policies, and the payment of the over due premiums on the old policies.

    And the Company cancelled the old policies, and marked on them "to favor W. H. Brune," and "lapsed" 18 January, 1872, and struck out the name of Rosalie C. Barry on their Register of the policies, and put the name of Brune thereon, and the old policies had numbers on them referring to the pages of the Register, and so had the new policies and the profits in the Company, on the former policies were credited on Brune's paying up the over due

premiums, and memorandums were made on the new policies of the over due premiums having been paid up.

The new policies were then accepted by Brune "in the place and stead of, and as substituted for the policies which had been surrendered and cancelled as aforesaid." The times of payment of the premiums was afterwards changed at request of Brune from annual to semi annual.

17. John S. Barry died on 9th March, 1872, and notice was given to the Company.

18. On 13th February, William H. Brune made an assignment to Horatio L. Whitridge, in trust for creditors of all his property, including these policies.

19. On 13th April, 1872, Mrs. Barry brought this suit, "*and on the same day an order was procured restraining the Company from making payment*" to Brune or Whitridge, and the order was afterwards continued and made absolute.

On 1st July, 1872, the answers of Brune and Whitridge were served.

On 9th September, 1872, Whitridge commenced suits at law against the Company in Baltimore, in Circuit Court of United States, for the District of Maryland, upon the two policies dated 18 January, 1872.

In these suits the Company pleaded the pendency of the New York suit and making no other defence, and on the 2nd December, Whitridge recovered judgment in that suit for $27,175, being the whole amount of the policies with interest and costs, "*the said judgment remained wholly unpaid, the Defendant, the Mutual Life Insurance Company having taken the same to the Supreme Court of the United States for review by writ of error to said Circuit Court.*"

Whitridge died on 11th February, 1874, and J. Morrison Harris was appointed his successor, and on 4th January, 1875, Harris appeared by counsel here, and by order of Court Whitridge's answer stands as his answer.

20. *The Company has at all times conceded its liability* on the new policies, and has at all times offered to bring the money into Court, if discharged from liability thereon, and it does not in any manner collude with either party.

CONCLUSIONS OF LAW.

1. The Complainant Rosalie C. Barry has never parted with her rights.
2. As against her, neither Brune nor Whitridge nor Harris ever acquired any rights to her policies.
3. The surrender of the original policies, and the issuing of the new ones under the circumstances, constituted a waiver of any forfeiture, and revived, renewed and continued the contracts of insurance evidenced by the new policies nominally in favor of the Defendant Brune, but in reality for the use of the Plaintiff in the same manner, as if no forfeiture had been incurred.
4. The Plaintiff continued to be beneficially interested in the said contracts under the new contracts, notwithstanding the name of William H. Brune was substituted for hers.
5. The Defendant never acquired any beneficial interest therein.
6. The Defendants Brune and Whitridge held the said policies, and Harris now holds the judgment recovered thereon in the Circuit Court of the United States, for the District of Maryland, charged with a trust in favor of said Plaintiff.
7. The Plaintiff is equitably entitled to recover from the Defendant, the Mutual Life Insurance Company, the money payable under the last mentioned policies.—viz: $25,000, with interest from 26th May, 1872.
8. The payment of such amount by the Mutual Life Insurance Company into Court, by depositing the same with the United States Trust Company of New York, will be in full satisfaction and discharge of all claims and demands against the Company, by either or any of the parties, "*and will operate in satisfaction and discharge to the amount of such payment, of the judgment heretofore recovered* by the said Horatio L. Whitridge, against the Mutual Life Insurance Company of New York, in the Circuit Court of the United States, for the District of Maryland, hereinbefore mentioned."
9. That the Defendants Brune and Harris, are enjoined from collecting said judgment, except as respects the residue if any, above the amount paid.

THE JUDGMENT.

After reciting the foregoing findings of fact and conclusions of law, the judgment was for $30.881.94, to be paid by the Mutual Life Insurance Company, into the United States Trust Company of the City of New York, and that such payment should operate as a payment and discharge *pro tanto*, of the judgment for $27,175, recovered by Whitridge against the said Company, in the Circuit Court of the United States, for the District of Maryland, on 2d day of December, 1873.

And Brune and Harris were enjoined from taking any proceedings for the collection of said judgment, except the costs.

"*And upon payment of said costs by said Company, the said J. Morrison Harris as successor of said Horatio L. Whitridge, do acknowledge satisfaction of the said judgment in such form, that the said judgment may be cancelled of record.*"

THE PAYMENT.

Afterwards on 11th October, 1875, the said Company paid the the sum of $30,899.71, pursuant to the judgment, an order was passed on 4th November, 1875, that said payment be taken as a compliance by the said Company with the provisions of the judgment.

The costs of the judgment in the Circuit Court of the United States, for the District of Maryland, were duly tendered by the Mutual Life Insurance Company, to J. Morrison Harris the plaintiff, in the City of Baltimore, on 7th December, 1875, and said Harris was then and there requested to sign an order for entering said judgment satisfied; but the said Harris refused to receive said costs so tendered, or to enter said judgment satisfied.

The papers filed with this motion, shew the facts hereinbefore stated, viz:—

(1.) *The Judgment Roll* of said case, duly certified according to Revised Statutes of the United States.

(2.) A certified copy of the order in relation to said *deposit by said Company*, in compliance with that judgment.

(3.) And an admission of said Harris, shewing *the tender of the costs and request to enter satisfaction*, and the refusal of Harris.

NOTE.

The Baltimore judgment being for	$27,175.00
Interest from 2nd December, 1873, at 6 per cent, to 11th October, 1875, one year, ten months and nine days	3,029 51
	$30,204.51
Which is less than the amount paid in the New York case	$30,899.71

The Plaintiff in error here making this motion, suggests for the consideration of the Court, the following

POINTS OF LAW.

1st. This motion is in the nature of a proceeding by way of *Audita Querela*.

See the form of the writ Fitzherbert's *Natura Brevium*.

The writ itself is obsolete.

See Wilson *vs.* Watson, 1 Peters' Ct. Ct. Reports, 274, Judge Washington says:

"The proper remedy is by *audita querela*, or *more properly* by rule of Court to shew cause."

Some explanation of the matter may be found in Turner *vs.* Davies, 2 Saunders, p. 148, (g,) and the learned note in Williams' Saunders—on same case. In Baker *vs.* Judges, &c., 4 Johns., 191, *held*—same relief is given *on motion* as by writ.

In 17 *Vt.* 253, and 19 *Vt.* 43, held: remedy by *A. Q.*, concurrent with *motion*. 4 Mass., 483. S. P. Walker, (Mich.,) 66.

In Va. and S. C. remedy by motion has superseded *A. Q.*

Smock *vs.* Dade, 5 Rand., 639.

Same in Md., Job *vs.* Walker, 3 Md., 132.

Huston *vs.* Disto, 20 Md., 305.

As to motion in preference to the writ, see what Judge Mansfield says in 4 Burrow, 2287.

See also 2 Tidd's Practice, 1131.

1 Bos. & Pul., 428.

1 Maule & Sel., 199.

Barnes, 277.

2 Ld. Raym., 1195.

3 Blackstone Comm., 405.

2. The case of Bowne *vs.* Joy, 9 Johnson, 221, (N. Y.,) *seems to be in point*, viz:—held.

"Where two suits are brought at same time, and for the same cause of action, and proceed *pari passu*, to judgment and execution, a satisfaction of either judgment may be shewn upon *audita querela*, in discharge of the other."

A decree in favor of a Plaintiff, in a suit for a sum of money, in the hands of one Defendant, for which he has been sued at law by a co-defendant, is a complete bar to a recovery at law.

Stokes *vs.* Mowatt, 1 U. S. Law J., 310.

3. The case of Humphreys *vs.* Leggett, 9 Howard, 297, in United States Supreme Court, is to same purport.

4. If the Plaintiff in Error here, has not this remedy it would seem to be remediless, for it has been held, that Injunction would not lie.

Greenup *vs.* Brown, 1 Illinois, (Breese,) 193.

Lasselly *vs.* Moore, 1 Blackford, (Indiana) 226.

So held in Huston *vs.* Disto, 20 Md, 305, because: (1.) There is a remedy at law; and (2.) There may be facts for a jury.

See learned argument of Alvey, then counsel, now Judge of Court of Appeals.

And S. P. in McRae *vs.* Davis, 5 Jones, (N. C.,) Eq. 140, and Parker *vs.* Jones, do. 276, held:

Injunction is not the proper remedy; but motion, on notice in nature of *audita querela* to call in a second execution erroneously issued.

It is true that in Humphreys *vs.* Leggett, it seems that in such case injunction might lie;—yet it is not intimidated that this proceeding would not lie, but on the contrary expressly said—"which would entitle him to relief by *audita querela*, or a bill in equity for an injunction."

5. As to the point, that no attempt to issue execution has been made.

In Glover *vs.* Chase, 27 Vt., 533. It is maintainable as well *quia timet*, as for defendants actually under execution.

And Ch. J. Hale in 1st Modern, 111, Lampiere *vs.* Mereday, allowed the writ *even before judgment* See particularly what he says about "taking out execution on a sudden, and behind Defendant's back."

6. As to *the Court* in which the motion is to be made; it would seem clear, that it ought to be *where the record is.*

Old Fitzherbert in his *Natura Brevium*, speaking of this writ under head *A. Q*, says: "If one recover in the Common Pleas, or King's Bench, debt or damages, and afterwards, by his deed, releaseth the same, and afterwards sueth forth execution upon the recovery, the party to whom he released shall have *audita querela* out of the Common Pleas, or King's Bench *where the record is*, and yet he may have an *audita querela* out of the Chancery, and so it shall be sometimes judicial, and sometimes original."

See Freeman on Judgments, sec. 95, Title *Audita Querelà.*

The Revised Statutes assimilate the practice in each Circuit Court to the practice in that State, see secs. 721 and 914 of R. S., of U. S., also the Supreme Court may give such judgment as the Circuit Court ought, see, secs. 701 and 716, and the Rules of Supreme Court adopt King's Bench practice of England.

See Rule, 3.

See Edwards *vs.* Elliott, 21 Wallace.

Supe. Ct. U. S., 532, and cases cited pp. 540, 544, 552.

7. It is in vain for Mr. Harris to say that the judgment of the New York Court may be reversed on appeal—the answer is nevertheless the Company has paid the money and he will get it there, if he succeeds on his appeal—because he has there claimed it, and that too before he sued in Baltimore.

8. If for any reason this Court should be of opinion, that the better form would be to remand this cause to the Circuit Court, with direction to enter the satisfaction there, which is prayed to be entered here, the Plaintiff in Error here will submit to such formal mode of attaining the end desired as this Court may esteem the best practice; but if the case be remanded without direction for entering satisfaction, the Plaintiff in Error may lose the benefit of his writ here, and prays therefore, that this Court will in any event protect its rights in that regard.

9. In any event, if the pendency of an Appeal in the New York case should be any reason at all, for denying this motion at this time, the Plaintiff will respectfully insists that the matters herein set forth constitute a good cause of continuance of this case in the discretion of the Court, until the next term of this